American Residential Services of Indiana, Inc., a Subsidiary of the ServiceMaster Company and American Residential Services, a Subsidiary of the ServiceMaster Company d/b/a Modern Heating & Cooling, Inc. *and* Sheet Metal Workers International Association, Local Union No. 20 a/w Sheet Metal Workers, International Association, AFL–CIO. Cases 25–CA–26991–1 and 25–CA–26992–1

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 14, 2002, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent's filed joint exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The judge found that the separate Respondent's, American Residential Services of Indiana, Inc. (ARS) and Modern Heating & Cooling, Inc. (Modern),[1] unlawfully refused to hire, and consider for hire, applicants affiliated with Sheet Metal Workers International Association, Local Union No. 20 (the Union). The judge also found that Modern unlawfully threatened employees with job loss if they supported the Union. The Respondent's have filed exceptions to the findings. We reverse the judge's findings concerning ARS but affirm his refusal-to-hire and unlawful threat findings concerning Modern.[2]

II. DISCUSSION

A. The Respondents

Respondent ARS installs and services residential heating, ventilating, and air-conditioning (HVAC) systems, and also performs some light commercial HVAC work. ARS is run primarily by Operations Manager Brad Jellison and Installation Manager Dave Reidel. ARS employs HVAC service technicians, entry-level HVAC service technicians (a/k/a apprentices), installers, and helpers.

Respondent Modern performs both commercial and residential HVAC installation and service work. ARS is run by General Manager Scott Warwick, Service Department Manager Jim Hughes, Commercial Department Manager Kevin Caplinger, and Residential Department Manager Rick Jenkins. Modern employs HVAC service technicians, commercial and residential installers, and helpers. Modern also has an unskilled duct cleaner position.

B. The Union's Youth-to-Youth Program

The alleged discriminatees were apprentices in the Union's 5-year apprenticeship program. The apprenticeship program teaches participants the skills to perform sheet metal work and HVAC work. This is accomplished through a combination of classroom instruction and on-the-job training with employers who have a collective-bargaining relationship with the Union.[3]

The apprenticeship program also features an organizing component, known as the "Youth-to-Youth Program." The Youth-to-Youth Program has been fully described by the judge, and in prior Board cases. See *Ken Maddox Heating & Air Conditioning,* 340 NLRB 43 (2003); *Sommer Awning Co.,* 332 NLRB 1318 (2000). For present purposes, it is sufficient to mention that the Youth-to-Youth Program requires the apprentices, usually after the third year of their apprenticeship, to take a leave of absence from their signatory employers and to seek employment with nonunion employers. The goal is to organize the nonunion employers from within.

Typically, an apprentice remains with the nonunion employer for about 6 months, at which time the Union directs the apprentice to return to his signatory employer to complete his apprenticeship. The apprentice must comply because, as the parties put it, he is "indentured" to the Union. If an apprentice fails to return to the apprenticeship program, he must reimburse the Union for all the costs of his training to that point.

The present case arose when, from about September 1999 through February 2000, certain apprentices in the Youth-to-Youth Program sought employment with ARS and Modern. The Respondent's did not hire any of them.

C. The Applicable Principles

The applicable principles are set forth in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). In a refusal-to-hire case, the General Counsel must establish: (1) that the respondent was hiring, or had concrete plans

[1] Although the Respondent's were subsidiaries of a common parent, the complaints do not allege that they were a single employer, alter egos, or joint employers.

[2] In view of our finding of unlawful refusals to hire, we find it unnecessary to pass on the judge's additional finding that Modern unlawfully refused to consider these applicants for hire. See *Sommer Awning Co.,* 332 NLRB 1318, 1319 fn. 4 (2000). Also, as discussed below, our finding that Modern unlawfully refused to hire the applicants does not extend to HVAC service technician positions.

[3] These employers are referred to herein as "signatory employers."

to hire; (2) that the applicants had experience or training relevant to the known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. A refusal-to-consider case requires proof that the respondent excluded the applicants from a hiring process at least in part because of their union affiliation or activity. In either case, if the General Counsel carries his burden, then a violation will be found, unless the respondent proves, as an affirmative defense, that it would not have hired the applicants even in the absence of their union affiliation for some nondiscriminatory reason.

D. ARS

The judge found that the General Counsel carried his burden on both the refusal-to-hire and refusal-to-consider allegations against ARS. We do not share the judge's assessment that the General Counsel presented one of the "strongest" *FES* cases, as there is little evidence that ARS Operations Manager Brad Jellison harbored any personal hostility to the applicants organizing activity. While Jellison acknowledged that a reason he did not hire or consider the applicants for employment was their status as apprentices in the Youth-to-Youth Program, which includes a requirement that program participants take 6 months off to engage in union organizing activity, he said that the applicants would not have been hired or considered for hire because of their short-term availability for employment. Still, we agree that the General Counsel's evidence was sufficient to shift to the Respondent its rebuttal burden to show that it would not have hired the alleged discriminatees without regard to their union affiliation. Unlike the judge, however, we find that ARS carried its burden and therefore the complaint allegations against ARS must be dismissed.[4]

The Board recently made clear that an employer may lawfully screen applicants based on their long-term employment prospects; provided, of course, that the employer treats similarly-situated union and nonunion applicants alike. See *Quantum Electric, Inc.,* 341 NLRB 1270, 1280 (2004). The record establishes that ARS had a policy of seeking new hires with long-term employment prospects. ARS Operations Manager Brad Jellison explained not only why ARS seeks long-term employees, but also how he attempts to achieve that objective. Jellison explained that ARS seeks long-term employees because it spends significant time and money, approximately $3000, training each new employee and he emphasized that ARS prefers to promote from within by grooming apprentices and helpers for more-skilled positions. As a result, he reviews applicants' employment histories for indications that they might not be long-term prospects. While Jellison said he has rehired former employees, he explained that he does so only after discussing with each individual why the person left ARS and why he wanted to come back. Contrary to the judge, we find that Jellison's detailed testimony establishes that ARS had a policy of seeking long-term employees.[5]

We also find that Jellison, applying this policy, would have rejected the Youth-to-Youth applicants because of their short-term availability. The record shows that the Youth-to-Youth applicants were only on "leaves of absence" from their signatory employers,[6] and that they were obligated to return to those employers, typically after about 6 months. The record also shows that Jellison, as a result of a prior industry training seminar he attended and earlier litigation between ARS and the Union, was familiar with these aspects of the Youth-to-Youth Program. Citing the same, Jellison credibly maintained that the applicants' participation in the Youth-to-Youth Program caused him to believe that the applicants would not become long-term employees.

The dissent advances the contention, made by the General Counsel and the Charging Party, that ARS engaged in disparate treatment, in that it did not uniformly apply its policy to union and nonunion applicants. It points to evidence that ARS hired certain nonunion applicants with spotty employment histories. The dissents underlying assumption, however, that those applicants were similarly situated to the Youth-to-Youth applicants, is without merit.

An employer that hires a new employee invests time and money to train him and orient him to the employer's practices and procedures, as well as its supervisors and employees. That employer risks the possibility that the employee will quit. If he does, the employer will realize little or no return on its investment in the employee and suffer the instability in the working environment which generally accompanies employee changeover. Consequently, it is not unreasonable for an employer such as the Respondent, which spends approximately $3000 to

[4] However, we find no merit in ARS's, or Modern's, argument that the Youth-to-Youth applicants were not "genuine" or "bona fide" applicants.

[5] Contrary to our colleague, the testimony of Jellison was not simply why an employer might adopt such a policy but rather why the Respondent did so.

[6] Youth-to-Youth applicant Eric Tresslar testified that he had taken a "leave of absence for six months" from his signatory employer. Applicant James M. Beard agreed that he "took a leave of absence" from his signatory employer upon entering the program.

train new employees, to attempt to mitigate that risk by seeking applicants with the potential for long-term employment. There is nothing in the record to show that the Respondent hired *any* applicant with the expectation that he would be a short-term employee. As Jellison acknowledged, ARS could never be certain that an applicant would become a long-term employee. However, for non-Youth-to-Youth applicants, the parties at least could begin with the potential for a long-term relationship. Even a spotty employment history, while it raises a concern as to the employees' longevity, does not foreclose long-term employment. In contrast, there was no such potential for the Youth-to-Youth applicants because they are financially obligated to return to the Union's apprenticeship program. Some Youth-to-Youth applicants might have wanted to stay with ARS for longer than 6 months, but they would have been forbidden to do so on pain of losing their apprenticeships. In light of these circumstances, we do not think ARS's preference for unencumbered applicants demonstrates disparate treatment based on Section 7 activity.

We disagree with our colleague's contention that ARS failed to show that it had a policy of seeking long-term employees. Jellison's testimony, recounted above, was uncontroverted. Further, he explained why an employer might favor such a policy and by reference to training costs, promoting from within, and other factors, indicated why and how ARS effectuated its policy. Similarly, our colleague's contention that ARS failed to show the Youth-to-Youth applicants were not potential long-term employees is inconsistent with the evidence. Jellison testified that he was familiar with the Youth-to-Youth Program and explained how he became familiar with the program and its requirement that participants return to their signatory employers after approximately 6 months. It was reasonable for ARS to rely on this knowledge even if it did not subject each Youth-to-Youth applicant to detailed questioning on this score.

Last, we find that our dismissal of the complaint against Respondent ARS on this ground is not inconsistent with *Sommer Awning Co.,* 332 NLRB 1318 (2000). In that case, the Board adopted the administrative law judge's rejection of the employer's argument that it lawfully disqualified certain union applicants, who were participants in the Youth-to-Youth Program, based on its policy against hiring temporary employees. Id. at 1327–1328. The judge found the employer's argument unpersuasive, essentially because the record did not show: one, that the Youth-to-Youth applicants were seeking only temporary employment; and, two, that the employer had a uniform policy of not hiring temporary employees. Based on the evidence discussed above, we find that ARS has presented convincing evidence on both points.

For these reasons, we find merit in ARS's contention that it actually would not have hired the applicants, or considered them for hire, even in the absence of their union affiliation due to their constrained availability for long-term employment.[7] Accordingly, we shall dismiss the complaint allegations against ARS.

E. Modern

1. Installer, helper, and duct cleaner positions

In agreement with the judge, we find that Modern unlawfully refused to hire the applicants for installer, helper, and duct cleaner positions because of their union affiliation. As to Modern, the General Counsel presented a compelling case. The judge found, similar to the evidence presented as to ARS, that Modern Commercial Department Manager Kevin Caplinger admitted that a reason Modern did not hire the applicants was their participation in the Union's Youth-to-Youth Program. Unlike the evidence as to ARS, however, Caplinger's testimony was also infused with evidence of his hostility toward the applicants. Caplinger admittedly regarded the applicants as troublemakers. As an example, he said that "if they don't have any success in organizing then their obvious responsibilities are to drum up as much trouble as possible for upper management, the company and people like myself." Cf. *Knoxville Distribution Co.,* 298 NLRB 688 (1990), enfd. mem. 919 F.2d 141 (6th Cir. 1990) (employer's comment that it did not need "troublemakers" evidence of animus).

Further evidence of Modern's antiunion animus is reflected in its hiring for the installer, helper, and duct cleaner positions. Commercial Department Manager Caplinger and Residential Department Manager Rick Jenkins claimed that they disqualified the applicants for installer positions because none had sufficient (3-5 years) installation experience, and that the applicants were ineligible for the unskilled helper and duct cleaner positions because none had a referral. However, the record shows that Modern dispensed with these requirements for applicants with no known affiliation with the Union.

On January 6, 2000, Modern hired James Caplinger, who had no relevant installation experience, as an installer.[8] With respect to the unskilled positions, Jenkins

[7] We express no opinion on how the outcome might differ in cases involving union organizers not enrolled in the Youth-to-Youth Program.

[8] Commercial Department Manager Kevin Caplinger testified, and Modern asserts, that James Caplinger was hired as a helper. However, Modern's own personnel record shows that James Caplinger was hired as an "Installer," as found by the judge. The Respondent has not as-

actually hired two covert union applicants, Jason Beard and Richard Draher, without a referral. Modern's selective application of its asserted hiring criteria to apparent union adherents, while relaxing the same criteria to seemingly nonunion applicants, lends further support to the judge's finding of unlawful motivation. See, e.g., *Action Multi-Craft,* 337 NLRB 268, 276–277 (2001) (relaxing asserted requirements only for seemingly nonunion applicants evidences illegal motive); see also, e.g., *Starcon, Inc.,* 323 NLRB 977, 982 fn. 13 (1997), enfd. in part 176 F.3d 948 (7th Cir. 1999) (waiving "new application" requirement for covert union applicant, but not overt applicants, revealed bias).

Moreover, in agreement with the judge, we find that Modern failed to establish that it actually would have refused to hire the applicants even in the absence of their union affiliation. As ARS Operations Manager Jellison did, Caplinger claimed that the applicants were disqualified from employment because of their short-term availability. However, Caplinger's claim was not persuasive. Caplinger was unaware of any policy against hiring short-term employees. Caplinger did not identify any method he employed to screen out short-term employees. Further, he provided no information regarding Modern's cost of training a new employee to support his assertion that hiring potentially short-term employees was problematic. Absent such evidentiary support, we reject Modern's claim that it would have refused to hire the applicants in any event due to their short-term availability.[9]

Last, we agree with the judge's observation that his refusal-to-hire finding regarding Modern is further supported by his additional finding, which we adopt, that Modern unlawfully threatened employees with job loss if they organized a union. See *Yellow Ambulance Service*, 342 NLRB 804, 804 (2004) (recognizing that a determination of actual motive regarding an 8(a)(3) finding may be supported by related violations committed by the respondent); *Howards Sheet Metal*, *Inc.,* 333 NLRB 361, 364 (2001) (finding that discriminatory discharge of one worker was relevant to consideration of contemporaneous discharge of a coworker who also engaged in union activity).

2. HVAC service technician positions

We find insufficient evidence to support the judge's finding that Modern unlawfully refused to hire Youth-to-Youth applicants for available HVAC service technician positions. Unlike the judge, we find that the General Counsel did not establish that the applicants had the experience relevant to Modern Service Department Manager Jim Hughes' established requirements for this position. Hughes explained that an applicant for an HVAC service technician position must have 3-5 years of field experience as a service technician and pass a written examination.[10] The General Counsel failed to establish that any of the applicants satisfied these requirements, or that Modern deviated from the requirements. See *Jacobs Heating & Air Conditioning,* 341 NLRB 981 (2004).

The General Counsel contends that applicants Michael McCormack and Nathan Wheeler each had more than 3 years of "HVAC experience." However, McCormack and Wheeler each admitted on cross-examination that he had never been employed as a residential HVAC service technician and had no field experience servicing residential HVAC systems. McCormack's residential experience was limited to the Union's 2-week residential HVAC training course and performing one or two installations. Wheeler also took the Union's 2-week training course and had installed commercial HVAC systems. Again, neither had any field experience servicing residential HVAC units.[11]

Finally, there is no evidence that Service Department Manager Hughes, unlike Caplinger and Jenkins, deviated from the stated requirements for the HVAC service technician position.

ORDER

A. The complaint against Respondent ARS is dismissed in its entirety.

B. The Respondent, American Residential Services, a subsidiary of the ServiceMaster Company d/b/a Modern Heating & Cooling, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act and by threatening employees with

serted that James Caplinger was allowed to bypass requirements because of any familial relationship with Modern's management.

[9] As the judge found, Modern's claim that it would have refused to hire the Youth-to-Youth applicants for unskilled positions because they lacked referrals is equally unpersuasive. See *Nelcorp,* 332 NLRB 179, 180 (2000), enfd. mem. 171 LRRM (BNA) 2512 (2d Cir. 2002) (respondent's deviation from hiring criteria undercut affirmative defense).

[10] Modern instituted the written examination in 1996, well before the events giving rise to this case.

[11] The judge found that there was little difference between servicing commercial and residential HVAC units. However, it was Modern's prerogative to insist on residential experience, so long as it applied this requirement to union and nonunion applicants alike. See *Jacobs Heating & Air Conditioning,* supra at 2. In any event, McCormack's and Wheeler's experience focused on *installing*, not *servicing*, commercial HVAC systems.

job loss if they selected the Union as their collective-bargaining representative.

(b) Refusing to hire job applicants because they participated in the Union's organizing program or because of their union affiliation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael B. McCormack, Charles E. Snyder, Jason M. Strausburg, Eric R. Tresslar, Jason A. Hilton, Nathan M. Wheeler, Gerald A. Thornell, Chad M. West, Eric L. Scott, Richard S. Teffertiller, and Jay Bradley Petticord employment in installer, helper, or duct cleaner positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges; if necessary terminating the service of employees hired in their stead.

(b) Make whole all those individuals identified in subparagraph (a) in the manner described in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Michael B. McCormack, Charles E. Snyder, Jason M. Strausburg, Eric R. Tresslar, Jason A. Hilton, Nathan M. Wheeler, Gerald A. Thornell, Chad M. West, Eric L. Scott, Richard S. Teffertiller, and Jay Bradley Petticord and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Indianapolis, Indiana facility, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, dissenting in part.

If, in fact, Respondent ARS had established that it actually had a policy of seeking long-term employees, that it uniformly followed that policy regardless of an applicant's union affiliation, and that the Youth-to-Youth applicants were not potential long-term employees, then I would agree with the majority that there was no unlawful refusal to hire here.[1] But the evidence does not support a finding that any of these things was true, much less all three. Thus, this case is indistinguishable from *Sommer Awning Co.*, 332 NLRB 1318 (2000), where the Board found a refusal-to-hire violation.

There, the Board rejected the employer's argument that it lawfully disqualified similarly-situated Youth-to-Youth applicants based on a policy against hiring temporary employees. Id. at 1327–1328. The Board found that the respondent failed to establish that it actually had a uniform policy of not hiring short-term employees or that the Youth-to-Youth applicants were seeking only temporary employment. The same is true here.

ARS provided scant evidence that it actually had an established policy of not hiring temporary employees. ARS Operations Manager Brad Jellison offered logical reasons why an employer might adopt such a policy, including training costs, but he offered little evidence that ARS actually had done so. There is no documentation of the alleged policy, no evidence that it was disseminated

[12] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I join my colleagues in affirming the judge's finding that Respondent Modern unlawfully refused to hire the Youth-to-Youth applicants for the installer, helper, and duct cleaner positions, and unlawfully threatened employees with job loss if they supported the Union. However, for the reasons given by the judge, I also would adopt his finding that Modern unlawfully refused to hire the applicants for available HVAC service technician positions.

within ARS, no evidence that ARS inquired of any Youth-to-Youth applicant about his desire for long-term employment,[2] and no evidence that ARS ever communicated to any applicant an antipathy toward short-term employment. See *Sommer Awning*, supra at 1328. Even Jellison's asserted practice of reviewing applicants employment histories was supported only by his general observation that "you can look at longevity at other jobs," without any specific evidence that he had ever engaged in such an analysis. The Respondent's posthoc effort to explain events is entirely self-serving.

Instead, the record compels the conclusion that ARS simply did not have a policy of screening out applicants who appeared unlikely to become long-term employees. During the relevant period, September 1999 through February 2000, ARS hired numerous nonunion applicants whose employment histories suggested they were anything but long-term prospects. ARS rehired former employees who had quit ARS in the past.[3] ARS also hired applicants who had recently left jobs after short-time periods.[4] This evidence belies the notion that ARS had a policy of screening out applicants who lacked a commitment to long-term employment. And, even if it did, Jellison's demonstrated willingness to hire less-than-promising nonunion applicants demonstrates that the policy was not uniformly enforced.

In any event, ARS failed to establish any credible basis for believing that the Youth-to-Youth applicants were seeking only short-term or temporary employment.[5] The Board rejected a similar claim in *Sommer Awning*. There, the Board emphasized that none of the Youth-to-Youth applicants indicated a desire only for short-term employment, and that the employer's contrary conclusion was based on assumptions and second-hand information about the Youth-to-Youth Program.

Similarly, none of the Youth-to-Youth applicants told ARS he was interested only in temporary employment, likely because the Union did not strictly limit the time period an apprentice could work for a nonunion employer, especially if his organizing efforts showed signs of success. ARS's position that the Youth-to-Youth applicants would resign after 6 months ignores the possibility that its employees might actually embrace the Union.

Moreover, Operations Manager Jellison did not bother to ask a single Youth-to-Youth applicant about his availability for or commitment to extended employment, though Jellison assertedly discussed such matters with former nonunion employees. In the end, Jellison had no credible basis on which to exclude the Youth-to-Youth applicants as temporary employees.[6] Indeed, all Jellison actually knew was that the Youth-to-Youth applicants were organizers. His failure to make further inquiries more directly reflects that an awareness of the applicants participation in the Youth-to-Youth Program was all he needed to know. Accordingly, I dissent from the majority's dismissal of the complaint as to ARS.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal Labor Law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten employees with job loss if they select the Union as their collective-bargaining representative.

WE WILL NOT refuse to hire job applicants because they are participating in the Union's organizing program or because they are members of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[2] Respondent ARS's employment application expressly inquired whether the applicant was interested in full-time or part-time employment, but said nothing about permanent or temporary employment. ARS's employment advertisements did not mention a desire for long-term employees.

[3] The majority observes that Operations Manager Jellison discussed with these former employees why they left ARS and why they wanted to return to ARS, as a way to gauge their commitment to long-term employment. Significantly, Jellison did not provide a single Youth-to-Youth applicant with a similar opportunity to be heard.

[4] As examples, the following list shows nonunion applicants hired by ARS and the time periods each applicant had been with his last 2 employers, most recent first: John Ruble, 6 and 11 months; Dominic Roemble, 11 and 8 months; Bobby Elliot, 5 and 2 months; Jeff Dunn, 1 and 12 months; Anthony Stout, 7 and 8 months; and Travis Lee, 3 and 6 months.

[5] The judge made a similar finding in rejecting the Respondent's argument that the Youth-to-Youth applicants were not "bona fide" applicants.

[6] As the majority observes, the record suggests that there has been prior litigation between ARS and the Union. However, Jellison did not provide any details of that litigation. His knowledge of the litigation was based only on reports from other company officials.

WE WILL, within 14 days from the date of the Boards Order, offer immediate full employment to Michael B. McCormack, Charles E. Snyder, Jason M. Strausburg, Eric R. Tresslar, Jason A. Hilton, Nathan M. Wheeler, Gerald A. Thornell, Chad M. West, Eric L. Scott, Richard S. Teffertiller, Jay Bradley Petticord in installer, helper, or duct cleaner positions for which they applied or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges that they would have enjoyed had they been hired.

WE WILL make the named individuals whole for any loss of earnings and benefits that they have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL remove from our files any and all references to the unlawful refusal to hire the named individuals and notify them in writing that this has been done and that our unlawful refusal to hire them will not be used against them in any way.

AMERICAN RESIDENTIAL SERVICES A SUBSIDIARY OF THE SERVICEMASTER COMPANY, D/B/A MODERN HEATING & COOLING, INC.

Walter Steele and *Derek A. Johnson, Esqs.,* for the General Counsel.

Todd M. Nierman,[1] *Esq. (Baker & Daniels),* of Indianapolis, Indiana, for the Respondent.

Neil E. Gath, Esq. (Fillenwarth, Dennerline, Groth & Towe), of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on December 11–14, 2000, and on January 29–30, 2001, in Indianapolis, Indiana. A charge was filed on March 16, 2000, by Sheet Metal Workers International Association, Local Union No. 20, a/w Sheet Metal Worker's International Association, AFL–CIO (the Union), and the complaint issued on July 27, 2000, in Case 25–CA–296991–1 against American Residential Services of Indiana, Inc., a subsidiary of the ServiceMaster Company (Respondent or ARS or American Residential Services). Another charge was filed on March 16, 2000, by the Union and a complaint issued on August 28, 2000, in Case 25–CA–26992–1 as amended, against American Residential Services, a subsidiary of the ServiceMaster Company, d/b/a Modern Heating & Cooling, Inc. (Respondent or Modern), and (Modern and American Residential Services) jointly referred to as the Respondent.

The complaints allege as violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), that the Respondent, ARS, refused to hire or consider for hire the following eight applicants on various dates in September and November 1999:

Jason A. Hilton	September 22, 1999
Nathan M. Wheeler	September 22, 1999
Eric L. Scott	November 4, 1999
Richard S. Teffertiller	November 4, 1999
Jason M. Strausburg	November 9, 1999
Eric R. Tresslar	November 9, 1999
Charles E. Snyder	November 10, 1999
Kenneth Stewart	November 10, 1999

and (b) that the Respondent, Modern refused to hire or consider for hire the following 11 applicants at various dates in September, October, and November 1999:

Michael B. McCormack	September 20, 1999
Charles E. Snyder	September 20, 1999
Jason M. Strausburg	September 20, 1999
Eric R. Tresslar	September 20, 1999
Jason A. Hilton	October 1, 1999
Nathan M. Wheeler	October 1, 1999
Gerald A. Thornell	October 22, 1999
Chad M. West	October 22, 1999
Eric L. Scott	October 29, 1999
Richard S. Teffertiller	October 29, 1999
Jay Bradley Petticord	November 3, 1999

The complaint also alleges as a violation of Section 8(a)(1) (a) that Respondent ARS told applicants that the reason that their telephone messages were left unanswered was because they were union members; and (b) that on January 18, 2000, Respondent Modern threatened its employees with the loss of jobs if they selected the Union as their collective-bargaining representative.

The Respondent's filed timely answers in which the jurisdictional allegations were admitted and in which the Companies denied that they had committed any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent's, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent's, ARS and Modern, are corporations engaged in the installation, service, and repair of heating, ventilating, and air-conditioning systems, with offices located in Indiana, including an office and place of business in Indianapolis where they annually purchase and receive goods valued in excess of $50,000 directly from points outside the State of Indiana. The Respondent's are admittedly employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

The Respondent's, ARS and Modern, are subsidiaries of ServiceMaster Company. ARS, a nonunion company, is pri-

[1] The Respondent's notice to substitute Counsel of Record requested the appearance of Todd M. Nierman in lieu of Philip J. Gibbons.

marily engaged in residential service, repair, and installation service of heating and air-conditioning equipment, as well as light commercial work. Its operations manager is Bradlee Jellison. Three supervisors report to him: Mark Flashkamp, Mike Puckett, and Chris Key. The installations manager for ARS is David Riedel.

The Respondent, Modern, also a nonunion company, is engaged in commercial and residential repair, service and installation of heating, ventilating, and air-conditioning systems. Scott Warwick is the general manager. Reporting to him are Jim Hughes, manager of the service department; Kevin Caplinger, manager of the commercial department; and Rick Jenkins, manager of the residential department.

ARS employs approximately 30 service technicians who diagnose and service residential furnaces and air-conditioners, and about 30 installers and apprentices who install new equipment. Modern has approximately 12 technicians, as well as about 20 installers and helpers.

Between September 1999 and February 2000, ARS and Modern hired a number of service technicians, installers, and helpers. The Respondent's refused to hire any of the 19 union applicants who made determined efforts to gain employment with ARS and Modern.

The union applicants at ARS and Modern were enrolled in a 5-year apprenticeship program with their Union, Local 20. The apprenticeship includes a 6-month tour of duty known as "Youth-to-Youth Program." The participants were trained in all phases of sheet metal work, including theoretic instructions, teaching drafting, reading blueprint, and layout. The training included practical experience involving the tearing down and rebuilding of heating and cooling systems. The participants gain experience in air-conditioning and heating systems by working for a participating employer. In the third year of their apprenticeship, the candidates take a 6-month leave of absence to become employees of the Union as organizers, in an effort to pursue the Union's goal to organize the unorganized workers in the trade. During this time, the candidates solicit positions with nonunion employers. The usual duration of employment with a nonunion employer is 6 months, but it may last longer, so that some apprentices worked for more than 2 years for a nonunion employer and thereafter returned to complete their apprenticeship.

In order to obtain employment with a nonunion company the applicants apply "overtly" or "covertly." Those who applied overtly usually displayed a baseball cap and other insignia showing their union affiliation. They often apply in groups. Their employment applications revealed the Union as an employer. The covert applicants, on the other hand, did not disclose their union affiliation during the application process. In all cases, the applicants were under orders of the Union to work hard and to do a good job during their employment.

The Local 20 Youth-to-Youth Program has been the subject of a prior Board decision in a similar refusal-to-hire case. *Sommer Awning Co.,* 332 NLRB 1318 (2000). Other cases involving the same Union and the same program under factual circumstances similar to those involved here, have been decided by administrative law judge's.[2]

The ARS Applicants

Eight union applicants applied overtly at ARS. Nathan Wheeler and Jason Hilton, wearing their union hats, went to the ARS offices and spoke to the receptionist on September 22, 1999. She told them that she believed that ARS was hiring. Wheeler and Hilton filled out applications and submitted them complete with their resumes to the receptionist. She indicated that she would give the applications to Brad Jellison, a manager. Yet the applicants were never contacted by the Company.

Eric Scott and Richard Teffertiller visited the ARS office on November 4, 1999. They completed the applications, noting that they were union organizers. They submitted the applications and their resumes to the receptionist. She said that Kathy Todd would look at the applications and get in touch with them. Yet they were not contacted by ARS.

Jason Strausburg and Eric Tesslar, wearing union hats applied in person at ARS on November 9, 1999. The receptionist, Roxanne Smith, told them that ARS was hiring, and that they should speak to Brad Jellison about an interview. They submitted their applications and resumes. They also left a voice mail message with Jellison. But he did not contact them. Strausburg made another attempt to apply at ARS in December 1999 without success.

Charles Synder and Kenneth Stewart applied at ARS on November 10, 1999. They completed the applications and enclosed their resumes. Stewart wore a union hat and a union jacket. The applicants disclosed on their applications that they were union organizers. Sandy, the receptionist, indicated that the Company was accepting applications for HVAC positions. Yet, ARS did not contact these applicants.

The two applicants, Strausburg and Tresslar, as well as Wheeler, went to ARS offices again on December 1, 1999, to renew their applications. They noticed a posting in the parking lot with the message: "Now hiring HVAC Service Techs." Tresslar then spoke with the receptionist named Sandy, who revealed that ARS had recently hired an employee. She also said that the reason for their inability to obtain an interview may have been "because you're union and ARS isn't a union company."

In sum, the record shows that eight union applicants who had applied at ARS overtly and who had revealed their union affiliation were never contacted by the Respondent, in spite of their subsequent efforts to check on the status of their applications.

During the same time from September to December 1999 when the overt union applicants submitted their applications, two covert applicants were not only interviewed by ARS management but offered employment. Jason Beard, a union member, submitted his application on October 19, 1999, without revealing his union background or affiliation. Brad Jellison

[2] See decisions by administrative law judge's in *Dial One Hoosier Heating & Air Conditioning Co.,* JD–5–01 (Jan. 16, 2001); *Ken Maddox Heating & Air Conditioning,* JD–76–98 (June 15, 1998); Supplement Decision, JD–163–00 (Dec. 8, 2000); *Kelly Construction of Indiana, Inc.,* JD–52–99 (May 11, 1999); *Tradesmen International,* JD–131–00 (Oct. 6, 2000).

interviewed Beard on the same day and informed him that ARS would contact him if a job vacancy occurred. On December 1, 1999, Beard received a call from David Riedel, new construction manager, for an interview. Following the interview on December 1, 1999, Riedel offered Beard a job (Beard did not accept the position because he was already employed at Modern). Similarly, Jamison Clark, a member of Local 20, applied covertly on December 6, 1999. The receptionist referred him to David Riedel for an interview on the same day. On the following day, December 7, 1999, Riedel called Clark with a job offer as an installer.

The Applicants at Modern

The Indianapolis Star News carried an advertisement in September 1999, soliciting applications for HVAC installers with at least 3 years experience. Several members of Local 20 responded. Michael McCormack, a member of Local 20, applied on September 20, 1999, at Modern. He wore his union hat and also noted his status as union organizer on his application. His application showed that he had at least 3 years experience. Even though he had repeatedly called Respondent's contact person, Rick Jenkins, the Respondent failed to consider his application.

Charles Synder, Jason Strausburg, and Eric Tesslar also visited Modern's facility on September 20, 1999, in search of work. They spoke to Heather Broderdorp, who stated that she would refer their applications to Rick. The applicants wore a union hat and noted on their applications their union connections. The Respondent did not respond to their applications. The applicants followed up on their efforts to obtain employment. On October 11, 1999, Tresslar called Modern's offices and left a message. On about October 19, 1999, Tresslar and Strausburg visited Respondent's office and spoke to the receptionist. A week later Strausburg was able to speak to Rick Jenkins. He told them that the Company was not hiring any installers. Snyder returned to Modern's offices on November 3, 1999, to inquire about his pending application. Tresslar called the office on November 10, 1999, and Strausburg called the office again in December 1999. Yet Synder, Strausburg, and Tresslar's attempts ended without success.

Nathan Wheeler and Jason Hilton submitted their applications on October 1, 1999. Like other overt applicants, Wheeler and Hilton wore their union hats. They had responded to the advertisement in the Indianapolis Star. Their applications demonstrated that they had more than 3 years of HVAC experience. Yet, the Respondent failed to respond to their applications. Wheeler and Tresslar who had previously applied went again to the Respondent's offices on November 30, 1999. They spoke to the receptionist, named Heather, to check on their applications. They offered to renew their applications, but their efforts to get hired remained without success.

Gerald Thornell and Chad West went to Modern on October 22, 1999, to apply. They too had seen the advertisement in the Indianapolis papers. The applicants wore union hats and showed on their applications that they were union organizers. Thornell and West had over 3 years of HVAC experience. They spoke to the receptionist, Bonita Gobel. She asked them whether they were interested in service work or installer work. When Thornell replied that he was interested in both jobs, Gobel said that he had to take a service test. On October 26, 1999, he took the test. Thornell returned on the following day to the Company's office to get his jacket, which he had left behind. He then noticed a sign stating, "Not accepting applications for installers at this time." Thereafter, Thornell called the office repeatedly. He was once able to reach Jim Hughes. Their attempts to get a job remained fruitless.

Eric Scott and Richard Teffertiller visited Modern's office on October 29, 1999, in the hope of finding a job. Both applicants filled out applications. They also took a service test. Jim Hughes who had told them to take the test also indicated that the Company was not hiring at that time. They were never contacted about the outcome of their tests nor invited for an interview at any time thereafter.

Synder who had applied at Modern on September 20, 1999, returned to the facility on November 3, 1999. He brought with him Jay Bradley Petticord. The receptionist, Heather Broderdorp, informed Synder that his application was current and she told Petticord that he needed to take a test. Porticort completed the test and submitted his application. Neither applicant was hired.

In sum, Respondent Modern, refused to consider any of the 11 union applicants and completely ignored their applications. On the other hand, the union applicants who applied covertly were offered employment.

Richard Draher, a union member, applied on October 15, 1999, without disclosing his union affiliation. Within hours of his application, Modern's manager, Kevin Caplinger, interviewed Draher and hired him as a helper in the commercial department. Caplinger told Draher that the Company was really busy and that they were hiring. Caplinger encouraged Draher to refer other applicants for jobs at Modern.

James Beard, also a member of Local 20, applied at the suggestion of Draher at Modern on October 21, 1999. Beard also did not reveal his union status, nor did he refer to Draher as a reference. Within a week, Beard was interviewed and hired as a helper.

During the same time, the applications of Thornell and West who applied overtly were ignored.

On December 1, 1999, Jason Hilton decided to apply covertly—he had earlier applied overtly on October 1, 1999, without any success. Hilton's covert attempt proved successful after he submitted an application, which was silent as to his union affiliation. The Respondent hired him as a helper in December 1999.

Ultimately, after they had worked for 3 months, the Respondent learned that Beard and Draher were union organizers. On January 18, 2000, the Respondent's manager of the commercial department, Kevin Caplinger, held a meeting with the employees about the Union's organizing efforts. Caplinger disclosed to the group that Beard and Draher were union organizers who are committed to convince the employees to join the Union. Caplinger further stated that if Modern became union, it would end up going "belly up." Rick Warwick who with his brother Scott Warwick, were prior owners of the Company also attended the meeting. He underscored Caplinger's remark and similarly stated that the employees "could possibly loose [their]

job if [they] joined the Union."

Analysis

Here, the record contains the testimony of the 19 members of Local 20, as well as copies of their applications complete with their resumes showing the qualifications of each applicant. The record shows that the applicants correctly followed Respondent's application procedure and that they went to great lengths to keep the applications active by repeatedly following up on the status of their applications, which, according to the Respondent, were kept active in the Companies' files for 60 days. It is also uncontroverted that the applicants did not hide their union affiliations during the application process, but that they openly and intentionally revealed their status as union organizers and participants in the Youth-to-Youth Program, so that the Respondent's had ample knowledge of their union affiliation. The evidence also shows conclusively that the Respondent's did not respond to any of the 19 applications submitted by members of Local 20 who had applied overtly. Finally, the evidence shows conclusively that during the same time, the Respondent's not only responded to the applications submitted covertly, but that the covert applicants who possessed the same or lesser qualifications were hired by the Respondent's. The conclusion is accordingly compelling that the Respondents' failure to respond to any of the union applicants was related to their union affiliations.

The Respondent's have defended its actions by raising a number of issues, i.e. (a) General Counsel's witnesses are incompetent to testify because they were paid by the Union or had an interest in the outcome of this proceeding; (b) the alleged discriminatees are not bona fide applicants for employment; (c) the applicants are not entitled to the protection of the Act, because of the Youth-to-Youth Program; and (d) the General Counsel failed to make out a prima facie case, because the applicants were not qualified.

The Board has addressed these issues with specific regard to the practice of "salting" and the Youth-to-Youth Program. The practice of salting by paid union organizers has been analyzed by the Board involving the same Union, Local 20, in *Sommer Awning Co.*, 332 NLRB 1318 (2000). There, the Board found that Local 20's Youth-to-Youth Program, which promoted the applicants efforts to seek employment with nonunion companies, did not remove them from the definition of Section 2(3) of the Act as employees. Moreover, as decided by the Board, program participants are considered bona fide applicants for employment and are entitled to the protection of the Act.

The Board also rejected the Respondents' argument that the union applicants are temporary employees who would leave active employment at the end of the 6 months and should therefore not be considered bona fide applicants. There, as here, none of the applicants testified that they were interested in temporary employment. Moreover, they are free to leave the program and remain employed beyond 6 months. And, contrary to the Respondents' argument that the "alleged discriminatees had no intention of accepting employment with Modern or ARS," the consistent and unequivocal testimony of all applicants was that they would have accepted any employment if the Respondent's had offered it. The Union not only expected them to work hard and do a good job for their employer, but the work records of the covert employees (Beard, Draher, and Clark) showed that they were held in high regard by their employers. To suggest that the testimony of the union witnesses was tainted, because they were paid by the Union or had a financial interest in the outcome of the case is tantamount to an attempt to disqualify most witnesses. The Respondents' elicited testimony that the discriminatees who were subpoenaed by the Board and who testified in this proceeding were paid by their Union for the time spent as witnesses, including parking expenses. The Respondent's, however, did not offer any testimony about its witnesses as to whether their efforts in appearing as witnesses were compensated or not. In any cases there is no evidence to suggest that the applicants compromised their testimony in any way, and I reject the Respondents' argument.

The status of salts in a similar scenario was recently addressed in *Hartman Bros. Heating v. NLRB,* 280 F.3d 1110 (7th Cir. 2002), where the court held that (a), "the fact that the applicant is" a salt does not entitle the employer to infer that he wont be a bona fide employee," and (b), a lie on a job application is not material "at least if [the] lie concerns merely his status as a salt, union organizer, or union supporter and not his qualifications for the job."

Similar to Local 20's practice, the court defined salting as follows:

> "Salting" is the practice whereby a union inserts its organizers into some employer's workforce in the hope that they will be able to organize it. Though salts do not intend to remain in the company's employ after the plant or other facility is organized, the Supreme Court has held that they *are* employees within the meaning of the National Labor Relations Act, implying that to fire or refuse to hire otherwise qualified salts merely because they are salts is an unfair labor practice because on the assumption that they are qualified the employer's motive *must* be the forbidden one of discriminating against employees on the basis of their being union supporters. *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85, 87 (1995).

Considering the Respondents' unmeritorious defenses to the decisions of ARS and Modern not to hire and not to consider for hire any of the 19 union applicants, the testimonies of Kevin Caplinger and Brad Jellison are particularly relevant to the Respondents' discriminatory conduct. According to their unequivocal testimony, the applicants were excluded because of their association with Local 20's Youth-to-Youth Program. For example, Brad Jellison, operations manager for ARS, who is in charge of the hiring policy at ARS, testified that he saw all the applications (including those of Stewart, Tresslar, Scott, Hilton, and Wheeler) and that they failed to meet his requirements because they were "part of the Youth-to-Youth Program for Local 20" (Tr. 766–769). Similarly, Kevin Caplinger, contract department manager at Modern who testified about his leading role in the hiring process at Modern, candidly admitted that the union applicants were not qualified for consideration by Modern because as organizers they are temporary employees. These are excerpts of his testimony (Tr. 293, 298, 299):

> That is why he was going to be temporary, is because he was an organizer. I didn't hire him because he was an organizer, I hired him because he was going to be a temporary employee—I couldn't hire him because he was going to be a temporary employee.
>
> . . . .
>
> I have a friend who is in Local 20 who I have had several discussions about the organizers, the apprenticeship program, the training the apprentices have and then also this process they have to go through as far as the organizer, where they go around and apply as organizers. Essentially their responsibility is to—
>
> . . . .
>
> It is not my opinion, it is a fact. They come in, they make every attempt they can to organize the union and if it doesn't work—if they don't have any success in organizing then their obvious responsibilities are to drum up as much trouble as possible for upper management, the company and people like myself. At the end of their six-month period they go back to their regular jobs.

The admissions by each of the Respondents' top managers provide the true motives behind the Respondents' discriminatory conduct, and an implicit recognition that the Companies were hiring at the time. Without further elaboration, I find that the Respondent violated the Act by refusing to consider for hire union applicants because: (1) the Respondent excluded them from the hiring process; (2) antiunion animus contributed to its decision not to consider the applicants; and (3) as shown below, the Respondent has failed to show it would not have considered the applicants even in the absence of their union activity or affiliation. *FES,* 331 NLRB 9, 15 (2000). See also *Sommer Awning Co.,* supra.

Significantly, the Board requires that the refusal-to-hire issues relating to ARS and Modern must comply with *FES,* supra. There, the Board restated the elements that the General Counsel must establish to meet its burden of proof in a discriminatory refusal-to-hire case as follows: "(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants." (331 NLRB 9, 12 (2000).)

ARS. The evidence is overwhelming that the Respondent was hiring and had plans to do so. Initially, several applicants (Wheeler, Hilton, Tresslar, and Strausburg) testified that the Respondent's receptionist indicated to them that the Respondent was hiring service technicians. In addition, in early December 1999, when two union applicants visited the office to check on their applications, they observed a sign, stating "Now hiring HVAC service techs." Moreover, in early December, ARS offered positions to two covert applicants James Clark and Jason Beard, positions as an installer and a helper, respectively. In addition, ARS hired approximately 18 new workers between September 1999 and February 2000.[3] They are as follows:

James Gibson	September 27, 1999	Service Technician
Jeremy Fonseca	October 21, 1999	Helper
Travis Lee	October 22, 1999	Installer
Thomas Shoemaker	October 18, 1999	Service Technician
Todd Wiley	October 14, 1999	Helper
Jamison Clark	December 9, 1999	Helper
Michael Edmonson	December 17, 1999	Helper
David Puckett	November 18, 1999	Service Technician
John Ruble	December 13, 1999	Service Technician
Jesse Hunter	December 30, 2000	Installer
Jeffery Dunn	December 13, 1999	Apprentice
Chris McFadden	December 16, 1999	Warehouse
Bobby Elliot	January 13, 2000	Helper
Robert Hansen	February 14, 2000	Service Technician
John Pendleton	February 7, 2000	Service Technician
Dominic Roembke	February 9, 2000	Service Technician
Anthony Stout	February 9, 2000	Service Technician
Harry Conlin	February 28, 2000	Installer

The General Counsel has satisfied the first requirement in *FES*, that ARS was hiring and had concrete plans to hire, by a showing not only what management had said, but also by what it did during the time the eight union members applied for jobs, i.e., ARS hired two covert union members and the 18 nonunion employees listed above.

The record also shows that the applicants had the experience and training relevant to the positions. Initially, the testimony of Brad Jellison reveals that for certain positions, namely entry-level service technicians or for apprentice or helper jobs no experience was necessary. Also the warehouse position was filled with an employee who had no prior service or installer experience. The evidence clearly shows that ARS had at least five available helper or apprentice positions and one warehouse job, which could have been offered to the union applicants. Jellison and David Riedel, installation manager at ARS, stated that the Company expected at least 2 years of experience for a diagnostic service technician and 3 to 5 years experience for an installation crew leader position. The application of union applicant Wheeler showed "HVAC Installer" experience from 1995 to 1999. Yet he was not even interviewed. Hilton's application listed HVAC experience. Teffertiller stated in his resume that he has installed heating and cooling units and air handling units and that he has a "Class B CDL license," necessary to handle refrigerant materials. The other candidates had similar backgrounds and certainly demonstrated skills in sheet metal work. Beard and Clark whose backgrounds were similar to those of the overt union applicants were offered jobs, Beard as helper and Clark as installer. They were not referred by anyone from ARS. Clearly, there was no reason, other than those admittedly expressed by Jellison, why the Respondent failed to consider or hire any of the eight applicants. I have reviewed the applications of the five or six employees hired by the Respondent as either helpers, as entry level service technicians or as warehouse employees, and I find that their backgrounds are not superior. To the contrary, the union applicants had the experience and background more suited to the Respon-

[3] The applicants renewed their applications as late as December 1999, which kept them active for 60 days.

dent's business than the employees actually employed. Clearly, the eight discriminatees had the necessary qualifications and experience relevant to the positions. The fact that covert applicant Clark became a successful employee as an installer shows that the overt applicants would not only have been eminently qualified as helpers or entry level positions, but also for the more skilled position as installer.

The General Counsel has also demonstrated the third element in *FES,* that union animus contributed to the decision not to hire the applicants. This element was clearly established by Jellison's candid testimony identifying the applicants' affiliations with the Union's Youth-to-Youth Program. Moreover, the statistical evidence standing alone, that none of the eight applicants received a response from ARS, that the equally qualified applicants who kept their union affiliation a secret were promptly interviewed and offered a employment and that the other employees hired had no union connection whatsoever, reveals Respondent's antiunion motive. Finally, of significance was the observation—overheard by several applicants—made by the receptionist Sandy Horton, that ARS is a nonunion employer and that the applicants' union affiliation may have been the reason for the Respondents' failure to respond their applications.

While I disagree with the General Counsel's argument that Horton acted as an agent of the Respondent and therefore expressed company policy, I find that her statement was an observation made by a person associated and familiar with the Respondent's hiring policies. The record shows that Horton functioned as a receptionist who handled the first stage in the application process. Her remarks were more in the nature of a personal opinion rather than a reflection that she either knew or expressed company policy. The evidence reveals that she was familiar with the routine of the application process but the record does not support a finding that she created the impression of an agent or that she had the authority of an agent. I therefore dismiss the 8(a)(1) allegation in the complaint. And I find that her remarks reflected a personal observation from her vantage point, albeit a hearsay statement, which, under the circumstances of this case, may be considered as corroboration of Respondent's antiunion animus.

I accordingly find that the General Counsel has demonstrated a prima facie case of an 8(a)(1) and (3) violation. I further find that the Respondent has failed to show that it would not have hired the applicants even in the absence of any union considerations. The Respondent tried to show that employees were hired pursuant to referrals or that applicants were only considered if they had residential HVAC experience. Yet, the Respondent hired numerous employees without referrals, certainly Beard and Clark as well as others, such as Anthony Stout, Jeffrey Dunn, and others. Residential experience was certainly not required for helper or entry-level service positions. Again, Clark and Beard were offered employment, they also demonstrated that the other union applicants who had similar backgrounds would have became good and valuable employees. Indeed, as already stated, several of the discriminatees showed on their resumes some residential experience. Finally, to suggest that the employees hired were superior, would ignore the evidence showing that same of them had a criminal history (Anthony Stout, and John Ruble), that some had bad driving records, such as suspended licenses, no licenses or traffic infractions (Jeremy Fonseca, Thomas Shoemaker, and James Gibson). Finally, the General Counsel has shown that ARS rehired employees who had previously quit their employment, ARS can therefore not claim that it avoided the hiring of individuals who lacked a long-term commitment. In sum, the Respondent was candid enough to admit that it refused to consider for hire and in fact failed to hire any of the eight union members because of their union affiliation, but the Respondent was less than candid by arguing that none of the union applicant were qualified. I am convinced that the Respondent intentionally ignored the union candidates and their qualifications.

Modern. The record shows conclusively that Respondent Modern was hiring and had concrete plans to hire. Initially, it is uncontested that Modern had placed advertisements in the local paper, Indianapolis Star, at various times from September 1999 to March 2000, in search of HVAC installers, technicians, and HVAC service representatives. For example, the advertisement for HVAC installer and HVAC service technician appeared from the beginning of October 1999 to the end of November 1999. The record shows that most of the 11 union applicants submitted their applications to Modern in response to the ads. In addition, the record shows that the Respondent hired three covert union members, Draher and Hilton were hired as helpers in October 1999 and Beard was hired as an installer helper in December 1999. Draher testified that Caplinger had informed him on the day he applied at Modern that the Company was busy and was looking for employees. Caplinger subsequently approached Draher on the job wanting to know whether Draher knew anybody interested in employment at Modern. According to Beard and Draher, Caplinger informed the employees at weekly meetings that the Company needed additional employees. They also recalled that Modern actually hired employees during their tenure at Modern (Draher from October 1999 to February 2000; Beard from November 1999 to February 2000). Draher testified that approximately six or seven new employees were hired in his section, the commercial department (Tr. 624):

> There was, I believe, Terry Bailey got hired on while I was there, Jason Beard and Jason Hilton both got hired on after I was there. There was a guy named Rick, a guy named Martin, and I know John Taylor—He worked there before I got there, but he got fired and then rehired while I was there. That's about all I can remember.

Beard testified as follows and similarly recalled the names of six new employees (Tr. 861):

> Seemed like every meeting Kevin was talking about how busy they was, how undermanned they was and he was always talking about undermanned, even asked the employees if they [knew] anybody, to bring them down if they had a drivers license.

The Respondent's list of employees hired between September 20, 1999, and January 2, 2000, include Melissa Gillespie, who had less than 3 years residential experience, as installer; Carl Riggs on October 20, 1999, Mark Broderdorp on Novem-

ber 30, 1999, as well as Draher, Beard, and Hilton, all in helper positions; Peggy Disney, as duct cleaner on November 18, 1999; and James Caplinger on January 6, 1999, as installer. The Respondent also admits that "record evidence that suggests Modern may have hired certain other employees, but their dates of hire are unknown" (R. Br. p. 14).[4]

Based upon the overwhelming record evidence showing that the General Counsel has satisfied the first requirement in *FES* that Modern was hiring, I now turn to the second requirement, that the applicants had the training and qualifications for these jobs.

Clearly each of the discriminatees would have qualified for the seven-helper and entry-service jobs, which the Company filled with nonunion applicants and the three covert union employees. Moreover, Modern had a need for employees during the relevant times that it interviewed people with less than the desired 3 years experience. Applicants' Wheeler and Hilton had almost 4 years HVAC experience. Indeed, the record shows that the typical Local 20 applicants had accumulated up to 3 years experience in the HVAC field, so as to qualify for the more skilled openings. Typical was the testimony of Local 20 applicant Michael McCormack who explained his qualifications (Tr. 427–428):

> A. Actually you get a wide range, you have your layout where you actually go out to the shop and layout fittings. You have drafting, which helps you create and also read blueprints. Also along with that we do have CAD, also you do have—how shall I put this, text book learning which you indicate what would be standards of how to do things and what not to do, what happens if corrosive would contact with this, if you could weld like galvanized and aluminum together. Stuff like that, knowledge information.
>
> Q. And as part of this program did you receive any training in residential HVAC prior to applying at Modern Heating?
>
> A. Yes, we did.
>
> Q. What was that?
>
> A. Actually you have two-week program where you actually tear down and rebuild heating and cooling systems as if it was in a residential home.
>
> Q. Does this involve setting up gas lines?
>
> A. Yes, it does.
>
> Q. Connecting electric lines?
>
> A. Yes.
>
> Q. And did you have any on-the-job residential experience?
>
> A. Yes, I did.
>
> . . . .
>
> Q. As part of the residential HVAC training you had, did you receive any certifications?
>
> A. Yes.
>
> Q. What was that?
>
> A. Certification Classifications 1 and 2, through the EPA for recovery of Freon.
>
> Q. What does that entitle you to do?
>
> A. It entitles me to work on any cooling systems other than chillers.
>
> Q. Give us an example of what you mean?
>
> A. It could be a window unit, it could be a central air unit, it could be a refrigerator, things like that.

All applicants had at least 3 years of sheet metal or duct installation experience, they had been trained in HVAC at a local college and in a 2-week program with the Union. Although the Respondent was emphatic in stressing that the Respondent was only interested in residential HVAC experience, the evidence showed that there is very little difference in servicing commercial units or residential units. The record supports a clear finding that all 11 applicants were more than qualified for any of the helper or entry service positions and that several of the applicants possessed skills and HVAC experience sufficient to qualify as installers.

The Respondent's argument that applicants especially those with little or no prior experience were hired pursuant to a referral policy, is belied by the record and the testimony of one of its supervisors, Rick Jenkins. He testified that he could recall only one referral in the year and a half while he was in charge of hiring as residential production manager. Moreover, the two covert applicants' Draher and Beard, as well as other employees were hired without referrals. And those who were hired pursuant to referrals did not support the Respondent's argument that they were better workers. Norman Pelfry, Mark Broderdorp, Carl Riggs, and Kevin Caplinger lasted no more than 2 or 3 months. Clearly, the Respondent did not adhere to its referral policy and relied on it for the purpose of excluding applicants with a union background. Respondent's next argument that the union applicants were unqualified because they lacked residential experience. However, the Respondent conceded that the helper and entrance level service technician positions required no prior experience. Obviously, the applicants from Local 20 demonstrated on the applications and resume more relevant training and experience than that of any of the employees who filled those jobs. The Respondent's managers who testified appeared sufficiently able to realize that individuals who had completed 3 years of training under the supervision of the Union in a relevant field would quickly mature into reliable and competent HVAC service technicians and installers in the residential or the commercial arena.

I further find that the General Counsel demonstrated by overwhelming evidence the final element that antiunion animus contributed to the decision of Modern not to consider for hire and not to hire any of the 11 Local 20 applicants. Caplinger's testimony, admitting that their association with the Union's Youth-to-Youth Program was the reason, provided conclusive evidence of Respondent's motivation. Also relevant is the statistical basis that none of the union applicants were consid-

[4] The General Counsel objected to my order limiting the use of four documents (GC Exhs. 67–70) showing the names of additional employees hired (Tr. 1160–1161). I believe that the record fully discloses a certain number and the qualifications of employees hired during the relevant time period in order to make a prima facie showing under *FES*. The Employer had employed a number of nonunion employees in position for which the 11 union applicants were qualified.

ered or hired except the ones who had hidden that information and that none of the successful candidates had a union background.

The complaint alleges three instances of 8(a)(1) violations, as additional evidence of Moderns antiunion animus in hiring practice.

First, Modern changed its hiring practice by placing a sign in its facility stating that it was not hiring even though it hired several applicants. Second, Modern required applicants to take a test as part of the application in order to screen out union applicants.

In this regard, the record shows that in October 1999 union applicant Thornell noticed a sign stating: "Not accepting applications for installers at this time." The Respondent does not dispute the posting of the sign, but argues that the Respondent actually did not hire any installers after that date and that it continued to accept applications for other positions such as helpers and service technicians. It is also clear that none of the union applicants were prevented from submitting their applications and that Modern continued to hire employees to fill helper positions or service technicians. The record shows that Caplinger was hired as an installer in January 2000, months after the appearance of the sign. Under these circumstances, I cannot find that the sign had any connections with the Union. I accordingly dismiss this allegation.

I make the same finding with respect to the allegation that the Respondent's testing requirement was discriminatory. The record shows that several applicants had to take a test entitled "Modern Heating and Cooling Pre-Qualification Test for Service Technicians." The General Counsel suggests that the six union applicants who applied prior to October 1999 were not required to take the test, but that the others (Thornell, Scott, Teffertiler, and Petticord) who applied in October or thereafter were required to take the test. Jim Hughes, service department manager, testified that the test had been in use since 1997 for all service technician positions, and that only those scoring above 50 percent were considered. The record does not contain any corroborating, documentary evidence that the test had been in use prior to October 1999. However, Hughes testimony was not controverted. The mere fact that some applicants were tested and others were not does not give rise to an inference that this test was used to screen out union applicants.

However, the 8(a)(1) allegation that management threatened the employees with the loss of their jobs is supported by the record.

On January 18, 2000, the Respondent assembled the employees at a meeting of the commercial department. The meeting was called after covert applicant Beard had disclosed his union membership. Beard testified as follows about the remarks made by Caplinger (Tr. 867):

> Kevin Caplinger got up. He read the fax that Local 20 sent to him saying that Rick Draher and Jason Beard were Local 20 organizers. Read through it all and then told the people that was up there that we had done a good job for them, don't let this bother you, but there might be some things that they might pass out brochures or handbill or whatever, but I don't want them talking about the union on my time, they can talk about it on breaks and lunch, but what they do on my time I don't what them to talk about it. And he told us—told the people not to sign anything and then he said, if Modern was to be union, it'd be detrimental to the company and we'd end up going belly up.

Rick Warwick, who with his brother Scott Warwick were prior owners, and whose brother was still president, also spoke (Tr. 867):

> He got up and basically said that—echoed that Kevin Caplinger said, that, if we was to go union, it would be detrimental and we'd end up going belly up because we do so many different types of work. . . .

Draher similarly recalled the remarks made by Caplinger and Warwick. According to Draher, Warwick said that the Union would not be good for Modern that it would be unable to compete with union contractors and that "his father, and his brother had worked long and hard to keep Modern no-union and that's the way it should stay" (Tr. 632). Despite Warwicks testimony denying that Caplinger made the "belly-up" statement, he did not deny the statements attributed to him, nor did Caplinger deny having made the statement.

The Respondent strongly objects to the allegation that Warwick was an agent of the Company. I have no difficulty finding such an agency relationship. Having been a prior owner still employed at Modern, he was obviously perceived by the employees as speaking on behalf of management, especially where, as here, he addressed a group of assembled employees in the presence of the admitted supervisor, Caplinger. Warwick invoked the names of his father as former owner, and his brother, the latter still highest executive. He was clearly perceived to be speaking on their behalf. Under these circumstances, I fully credit the testimony of Draher and Beard and find that the Respondent's remarks to the employees was an unlawful threat of a loss of jobs if the employees joined the Union. Caplinger's statement although not specifically alleged in the complaint was closely related to the allegation in the complaint and reinforced Warwicks remarks. The scenario interfered with the Section 7 rights of the employees with unlawful threats. I accordingly find that the Respondent violated Section 8(a)(1) of the complaint.

This violation provides additional evidence of antiunion motivation in the Respondent's refusal to consider for hire and its failure to hire the union applicants.

As already stated, short of the defenses already discussed, the Respondent provided no convincing evidence that Local 20 members would have been rejected for employment even in the absence of any union considerations.

Any further discussions as to the Respondent's defenses would be repetitive, especially, where as here, Respondent ARS made similar arguments. Clearly this is one of the strongest refusal-to-hire and refusal-to-consider cases, based upon primarily uncontested evidence, including the consistent and thoroughly credible but often repetitious testimony of the job applicants, and well briefed and persuasively argued by the General Counsel and the Charging Party.

CONCLUSIONS OF LAW

1. The Respondent's, ARS and Modern, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The union organizers are bona fide employees within the meaning of Section 2(3) of the Act.

4. Respondent Modern violated Section 8(a)(1) of the Act by threatening its employees with job loss if they selected the Union as their collective-bargaining representative.

5. Respondent ARS violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

By refusing to hire and consider for hire the following applicants on the following dates:

Jason A. Hilton	September 22, 1999
Nathan M. Wheeler	September 22, 1999
Eric L. Scott	November 4, 1999
Richard S. Teffertiller	November 4, 1999
Jason M. Strausburg	November 9, 1999
Eric R. Tresslar	November 9, 1999
Charles E. Synder	November 10, 1999
Kenneth Stewart	November 10, 1999

6. The Respondent, Modern, violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct.

By refusing to hire and consider for hire the following applicants on the following dates:

Michael B. McCormack	September 20, 1999
Charles E. Snyder	September 20, 1999
Jason M. Strausburg	September 20, 1999
Eric R. Tresslar	September 20, 1999
Jason A. Hilton	October 1, 1999
Nathan M. Wheeler	October 1, 1999
Gerald A. Thornell	October 22, 1999
Chad M. West	October 22, 1999
Eric L. Scott	October 29, 1999
Richard S. Teffertiller	October 29, 1999
Jay Bradley Petticord	November 3, 1999

REMEDY

Having found that the Respondent's have engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent ARS refused to hire and consider for hire Jason Hilton, Nathan Wheeler, Eric Scott, Richard Teffertiller, Jason Strausburg, Eric Tresslar, Charles Snyder, and Kenneth Stewart, and having found that Respondent Modern refused to hire or consider for hire Michael B. McCormack, Charles E. Snyder, Jason M. Strausburg, Eric R. Tresslar, Jason A. Hilton, Nathan M. Wheeler, Gerald A. Thornell, Chad M. West, Eric L. Scott, Richard S. Teffertiller, and Jay Bradley Petticord in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent's be ordered to immediately offer these individuals full employment at rates paid to the individuals hired by the Respondent's for the positions to which they applied or for which they would have been qualified to perform or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges; and if necessary, terminating the service of employees hired in their stead, and to make the aforesaid individuals whole for wage and benefit losses they may have suffered by virtue of the discrimination practiced against them computed on a quarterly basis as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Considerations regarding the remedy and the specifics of the relief granted the job applicants which the Respondent's refused to hire or consider for hire must wait until the compliance stage of the proceeding, see *Eldeco, Inc.*, 321 NLRB 857, 858 (1996).

[Recommended Order omitted from publication.]